U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 April 2003

CASE NO.: 2000-CAA-22

In the Matter of:

LINDA GASS
Complainant
v.

LOCKHEED MARTIN ENERGY SYSTEMS
Respondent

Appearances:

Edward A. Slavin, Jr., Esq.
For the Complainant

Robert M. Stivers, Jr., Esq.
For the Respondent

Before: MICHAEL P. LESNIAK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING MOTION FOR SUMMARY JUDGMENT

This matter is before me on Respondent's Motion for Dismissal and/or for Summary Judgment filed on or about December 15, 2000. Respondent argues persuasively that Ms. Gass' complaint is time-barred; that Ms. Gass filed her original Department of Labor ("DOL") complaint on August 18, 1995, and those allegations are the same allegations set out in the complaint before me; therefore, no violation could have occurred later than August 18, 1995, even though no dates are mentioned in the original complaint. Ten and one-half months later, on July 1, 1996, after filing her complaint in another forum, the United States Department of Energy Office of Hearings and Appeals ("DOE"), Ms. Gass, through counsel, withdrew her complaint before the Department of Labor, Wage and Hour Division. Almost four years later, on or about May 9, 2000, after electing not to proceed to trial before the DOE, Ms. Gass attempted to proceed with a DOL whistleblower complaint on the same facts as those contained in her August 18, 1995 complaint.

Thus, the issue before me has always been whether I have jurisdiction to hear the merits of her case against Lockheed Martin Energy Systems (Lockheed Martin) or whether her complaint is time-barred, considering the 30-day statute of limitations which control all of the statutes mentioned in her complaint. At the outset, I have permitted Ms. Gass to proceed for the limited purpose of showing whether there are equitable grounds why I should take jurisdiction of this case. By Order of April 23, 2002, all discovery was terminated concerning this issue and on December 18, 2002, I conducted an evidentiary hearing in Jacksonville, Florida where Ms. Gass testified.

EVIDENTIARY HEARING OF DECEMBER 19, 2002

Testimony of Linda Gass

Ms. Gass testified that she began work in Oak Ridge in 1982 with Union Carbide, the prime contractor that preceded Martin Marietta and then Lockheed Martin, and that she was employed by them until 1997. (TR 53) She testified that she was terminated because of a long-term disability. Ms. Gass has a degree in environmental science from the University of Tennessee, and also has college degrees in history, computer science, and environmental science. Before she filed her DOL complaint, Ms. Gass worked on several environmental cleanup and compliance projects. In addition, she became certified as an environmental auditor with the National Registry of Environmental Professionals. (TR 54) The ELSA Gate Project, a remedial action to clean up an industrial park open to the general public, gave rise to her 1995 complaint. Ms. Gass testified that she determined from her research that there was bound to be hazardous waste there. She further stated that the Department of Energy was in charge of the testing which was inadequate because they were not looking for hazardous waste, were, therefore, not finding hazardous waste, and were documenting that this area did not have hazardous waste. Ms. Gass stated that she was certain that hazardous waste existed and she wrote memorandums to this effect and also brought it up at meetings with high level Department of Energy employees. (TR 55) Ms. Gass testified that by writing the memorandum and reports she was "on the front line" to see whether she could actually survive in a career after having made these disclosures. The end result was that she never worked at that level again and was not even on the information flow after that. (TR 56)

Ms. Gass filed a whistleblower complaint with the DOL in August 1995. She was interviewed by DOL investigator, Tom Reesor, in the Spring of 1996 around January, February or March. After this, she stated that nothing seemed to be happening and that she kept trying to find out from Reesor what was happening and couldn't. (TR 58) She believes her DOL whistleblower complaint was pending for about eight or nine months before she filed a complaint with the DOE, in approxiamtely April 1996 (TR 59, 61) Ms. Gass filed her DOE complaint approximately April 1996. (TR 61) She testified that it was her understanding that her DOL complaint was being transferred to another forum. (TR 64) Ms. Gass retained an attorney, Mr. Hyder, in March 1996 and he represented her for approximately three years. (TR 66) Regarding Attorney Hyder's letter, Joint Exhibit 4, wherein he informed DOL that Ms. Gass was withdrawing any complaint with DOL, Ms. Gass testified that it was her belief that she was

transferring her case to DOE because Lockheed Martin would settle quickly and they were in the wrong forum. She was still working for Lockheed Martin at the time. (TR 73, 74) On or about July 1, 1996, Lockheed Martin was in the final stages of getting rid of her. She stated that she would call Mr. Hyder from work in tears, telling him that she thought they were going to fire her, that she was being targeted, and she was trying to hang on. (TR 75) After she filed her complaint in August 1995, the next month the company, "got me into a transfer position" at Y-12 in that department, nuclear material control and accountability. (TR 75, 76) When questioned as to why she acquiesced in transferring her case from DOL to DOE, she stated that although Investigator Reesor had interviewed her, nothing else was happening and she was trying to determine the next step, but didn't know the procedures. In addition, she was expecting a follow-up, nobody knew where he was, and to the best of her recollection, he had moved out of town and nobody else was doing anything. (TR 79) She further testified that she called Wage and Hour in Knoxville and, on one occasion, went in person to the Wage and Hour Office in Knoxville, trying to find out what was going to happen next. (TR 80)

Regarding the work she was performing, she stated that she was required to "dress out," and perform duties that were historically performed by muscular men. She testified that she obtained a doctor's limitation so she would not have to dress out more than twice a day. Ms. Gass described the work as dusty, and that she could not see with her eyeglasses. Moreover, certain areas required a respirator and protective equipment. She testified she was under a lot of duress because it was an extremely error-prone job and it was easy to make a mistake for which she could have been fired. In addition, she testified that although she had two masters degrees, another degree in computer science, and engineering courses, she was required to do a job that historically been done by muscular men. (TR 80, 81) With regards to her calling DOL, she believes she reached a person twice and spoke to somebody and then went to the office in person in order to find the investigator who interviewed her, Tom Reesor. She testifed that she was being pressured on the job; that she was under duress because on several occasions where things happened she potentially could have been fired and believed they could have made it look like she was at fault and she may have been fired. She was also getting called in about her performance and she was in a defensive mode trying to do everything exactly right, to document everything, and yet she had a supervisor, Krista Turner, who was targeting her. She eventually asked, supported by medical documentation, to be removed from Turner's supervision because she pressed her to such an extent. She testified that before filing her complaint in August 1995 her job title was senior engineering assistant in civil engineering and after she filed her DOL complaint, she was laid off from civil engineering. Next, she testified that her position changed to nuclear engineering assistant, which she had never done before. This was the new job that caused her duress and she started this job the first of week of October 1995. (TR 83-86)

When questioned as to why she transferred her case to DOE, Ms. Gass explained that she saw something on a bulletin board pertaining to protecting workers in DOE and also that, coupled with her attorney's recommendation that they move the case from Wage and Hour, which was doing nothing, to DOE where he was positive that the company would settle, was the reason she moved the case. She stated that she did not remember whether she told her attorney what she read

on the bulletin board about the DOE jurisdiction or whether he brought it to her attention. (TR 95, 96) She also stated that she wanted to "make changes on how things were happening to other people that worked there." (TR 89, 90) With regard to the Wage and Hour Division, she testified that no one informed her of the government shutdown in the Fall 1995 and that they just told her that Mr. Reesor wasn't available, they didn't know why, and nobody knew who to ask. (TR 107)

Ms. Gass testified that in August 1995 she was laid off from the civil engineering department. (TR 76) She was then transferred to nuclear material control and accountability starting the first week of October 1995. (TR 92) She stayed in this position until she was laid off in August 1996. She received the notice of lay off in August 1996 and worked until the end of October 1996. From on or about November 1, 1996 until April 1997 she was on short term disability. (TR 93) She finally left the company in April 1997 on long term disability. (TR 91) In terms of her physical and mental condition, Ms. Gass testified that she has joint and muscle pain, respiratory problems, chronic bronchitis, and also suffers from depression. (TR 94)

On cross-examination, Ms. Gass testified that when she filed her initial DOL complaint in August 1995, she received a lay off notice. She testified that in the early part of 1996, she saw a notice on a bulletin board at Y-12 (she had come from K-25). (TR 111) She described the notice as being on heavy stock pink paper, and that it caught her attention because she tried to keep up with what possible recourse there could be on her case. (TR 112) She stated that it struck her as being something new and she wondered why she had not heard of it before. She also testified that rather than being laid off, she accepted a job at Y-12. (TR 113) She next retrieved a copy of the Code of Federal Regulations dealing with Part 708 and provided that to her attorney who filed the Part 708 complaint with the DOE. (TR 114) In July or August 1996, she received another lay off notice but before the lay off date, she went on sick leave and for the first six months, she was on short term disability, receiving 100% of her pay. Thereafter, she went on long term disability. That particular benefit paid 60% of her wage. (TR 115) Ms. Gass is still on long term disability. Before she filed her DOL complaint in August 1995, she testified that she had been going through every possible redress for years and exploring every option in her mind. She testified that when she filed her DOL complaint she thought something was finally going to happen but by early 1996, nothing was happening. (TR 117) Moreover, when she filed her DOE complaint, it was her desire to have her discrimination complaint for retaliatory conduct adjudicated much more rapidly than it appeared to be happening with DOL because there was more and more pressure and increasingly escalated incidents on the job. Thus, she was willing to give DOE a chance and this is what her attorney recommended. (TR 118) She testified that she had a complaint pending before DOE until the Spring 2000. (TR 119)

EXHIBITS

Joint Exhibit 1 is a complaint filed by Linda D. Gass on August 18, 1995. The addressee is Ms. Carol Merchant, Wage and Hour Division, U.S. Department of Labor in Knoxville, Tennessee. The complaint is against Lockheed Martin Energy Systems, Inc. and Lockheed

Martin Corporation alleging that she was about to be terminated in a lay off due to her engaging in protected activity under various whistleblower statutes.[1]

Joint Exhibit 2 is a letter from Jerome A. Yurow, Complaint Analyst, Office of Contractor Employee Protection with the Department of Energy in Washington, DC to Mr. Gordon G. Fee, President, Lockheed Martin Energy Systems, Inc. in Oak Ridge, Tennessee dated June 11, 1996. This letter advises Mr. Fee that the Office of Contractor Employee Protection of the Department of Energy made a preliminary decision to accept jurisdiction of a reprisal complaint filed by Linda D. Gass, pursuant to Part 708, Title 10, Code of Federal Regulations. The letter goes on to say that DOE strongly encourages settlements and one of the most promising innovations they offer was the encouragement of voluntary alternative dispute resolution techniques and options. A summary of Ms. Gass' complaint is part of Mr. Yurow's letter.

Joint Exhibit 3 is a letter from Robert M. Stivers, Attorney for Lockheed Martin Energy Systems, to Jerome A. Yurow, dated June 18, 1996, stating that Lockheed Martin Energy Systems was willing to participate in an attempt to arrive at a mutually agreed upon resolution of Linda Gass' complaint before the Department of Energy. Mr. Stivers points out to Mr. Yurow that Part 708.6 requires that Ms. Gass affirm under oath that she has not pursued a remedy under state or other applicable law on the same set of facts as alleged in her DOE complaint. Mr. Stivers indicated that the DOE complaint was her third filing from the same set of facts. He encloses Ms. Gass' original complaint to the Equal Opportunity Employment Commission and responses thereto by Lockheed Martin, and a copy of the August 18, 1995 complaint before the U.S. Department of Labor, together with Lockheed Martin's response thereto. Mr. Stivers states that it appears from the documents and the summary provided by his office (I assume Joint Exhibit 2) that Ms. Gass was, in fact, simultaneously pursuing complaints with three agencies or offices based upon the same set of facts. He suggests that a review of Ms. Gass' right to file a third complaint on the same set of facts should be completed before any further action was taken by any of the parties.

Joint Exhibit 4 is a letter from Linda Gass' attorney at the time, Stephen Talbert Hyder, to Carol Merchant and Tom Reesor, Wage and Hour Division, U.S. Department of Labor, Nashville, Tennessee, dated July 1, 1996. It states that he represents Linda Gass as to any complaints that she has filed or has pending against her employer, Lockheed Martin Energy Systems, Inc. and Lockheed Martin Corporation. That Ms. Gass had pending a complaint filed with the Office of Contractor Employee Protection of the U.S. Department of Energy against the employer and that the purpose of his letter was to withdraw any complaint that was filed with the Department of Labor against said employers.

Joint Exhibit 5 is a letter from Carol Merchant, Acting District Director, Wage and Hour

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[1] Since I am only considering jurisdiction, the specific allegations of the complaint will not be reviewed, although if I had the Department of Energy's complaint, I could compare both complaints to see whether they are identical.

Division, U.S. Department of Labor to Gordon G. Fee, President of Lockheed Martin Energy Systems in Oak Ridge, Tennessee dated July 2, 1996. This letter indicates that Linda Gass withdrew her complaint with the Wage and Hour Division filed under the Clean Air Act, Comprehensive Environmental Response, Compensation and Liability Act, Energy Reorganization Act, Safe Drinking Water Act, Solid Waste Disposal Act and Toxic Substances Control Act. Accordingly, she planned no further action in the case.

Joint Exhibit 6 is a letter from Steven J. Goering, Staff Attorney, Office of Hearings and Appeals, U.S. Department of Energy, Washington, DC to Attorneys Edward Slavin and Robert Stivers dated May 8, 2000. It indicates with regard to a motion to transfer Ms. Gass' case to DOL OALJ filed by the complainant on May 1, 2000, that there was no procedure under the Part 708 regulations for transferring a complaint to another federal agency and if the complainant chose to file a complaint with the Department of Labor with respect to the same set of facts as alleged in her Part 708 complaint with DOE, her Part 708 complaint would be dismissed. He cites 10 C.F.R. § 708.15(d), 708.17(c)(3). Accordingly, the motion to transfer the case filed by the complainant, Case No. VWZ-0021 was dismissed.

Joint Exhibit 7 is a letter from Steven J. Goering to Attorneys Robert Stivers and Edward Slavin dated May 19, 2000. This letter states, among other things, that he was dismissing Ms. Gass' complaint with DOE given that Ms. Gass filed a complaint with the Occupational Safety and Health Administration with respect to the same set of facts as alleged in her complaint under Part 708. This was based upon Section 708.17(c)(3) which states that dismissal for lack of jurisdiction was appropriate if the complainant filed a complaint under state or other applicable law with respect to the same set of facts as alleged in a complaint under said regulation.

Joint Exhibit 8 is a letter from Carol Merchant to Attorney Edward Slavin dated September 5, 2000 indicating that it would be inappropriate to reinstate Ms. Gass' complaint of August 18, 1995 against Martin Marietta due to the statue of limitations.

Joint Exhibit 9 is a letter from Attorney Slavin to the Honorable John M. Vittone, Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC dated September 15, 2000. Essentially this letter is an appeal of the position taken by District Director Carol Merchant (Joint Exhibit 8).

Joint Exhibit 10 is a letter from Attorney Stephen Talbert Hyder to Attorney Steven J. Goering dated March 11, 1999 indicating that he and his client, Linda Gass, had reached irreconcilable conflict on the manner in which the hearing should be prosecuted and he requested that he be permitted to withdraw as her attorney.

Joint Exhibit 11 is a letter from Attorney Goering to Attorneys Hyder and Stivers dated March 15, 1999 permitting Mr. Hyder to withdraw as attorney for Linda Gass.

Joint Exhibit 12 is a letter from Attorney Donna H. Smith, Knoxville, Tennessee to Attorney Steven Goering dated May 26, 1999 entering her appearance as attorney for Linda Gass in Case No. VWA-0028 before the Department of Energy.

Joint Exhibit 13 is a copy of an e-mail sent by Attorney Smith to Attorney Goering, copy to Attorney Stivers dated July 19, 1999 indicating that Edward Slavin would serve as co-counsel for Ms. Gass, effective July 15, 1999.

Jont Exhibit 14 is a Notice of Withdrawal of Counsel submitted by Attorney Donna Smith on January 13, 2000.

Joint Exhibit 15 is a letter from Attorney Steven Goering to Attorneys Smith, Stivers, and Slavin dated January 28, 2000 permitting Donna Smith to withdraw as attorney for Linda Gass.

Discussion and Findings: Applicability of Tolling Doctrines; Waiver

There are two tolling doctrines that will, for equity purposes, stop the statute of limitations from running. These tolling doctrines have been applied in situations: (1) where the complainant has been actively misled by the respondent regarding the cause of action; or (2) has been prevented in some extraordinary way from asserting his or her rights; or (3) has previously raised the exact claim which by mistake was raised in an incorrect forum. *McGough v. United States Navy*, 2 OAA 3, 213, 86 ERA-18-20 (Decision and Order of Remand by the Secretary of Labor (June 30, 1988). The first tolling doctrine, equitable estoppel, focuses on whether the employer misled the complainant, thereby causing a delay in filing the complaint. The second doctrine, equitable tolling, focuses on whether a complainant was excusably ignorant of his or her rights or, alternatively, when a complainant files a timely complaint raising issues sufficient to state a cause of action under environmental whistleblowing laws, but files the complaint in the wrong forum. *Prybys v. Seminole Tribe of Florida*, 95 CAA 15 (ARC Nov. 27, 1996); *Biddel v. Department of the Army*, 93 WPC 9 (ALJ July 20, 1993). The equitable tolling doctrines, however, do not permit disregard of the limitation periods simply because they bar what may be an otherwise meritorious cause. *School District of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981).

It is my intention here to address only whether there exist equitable grounds for tolling the statute of limitations and ignore a myriad of other arguments. For example, complainant argues that DOL requires all parties to sign a whistleblower settlement when there never existed a settlement or that Ms. Gass' complaint (of August 18, 1995) was never withdrawn because withdrawal was not in her best interest, and was involuntary, etc., when her then attorney of record, Stephen Talbert Hyder, withdrew the complaint (Joint Exhibit 4) and explained that he had filed with DOE. Likewise, arguing that it was a mistake to re-file the complaint with DOE or

labeling DOE as an unfair forum, does not give me jurisdiction. Once again, whether she was misled by her attorney or whether he made mistakes cannot be issues before me. As far as references to *Atkins v. Schmutz Mfg. Co., Inc.*, 435 F.2d 527 (4th Cir. 1970), there is no vehicle for transfer similar to 29 USC 1406(a). Unlike *Atkins*, the complainant here made an election to file with DOL, where there existed jurisdiction and venue; thereafter, she made her own election (through her attorney) to withdraw her claim before DOL, and did so; then, she filed her claim with DOE, which had jurisdiction and venue to consider her claim, and used the savings statute with DOE to come within the statute of limitations.

A. Equitable Estoppel

Complainant suggests that respondent, Lockheed Martin, misled Ms. Gass by promising settlement if she dismissed her DOL action, that respondent demanded withdrawal of the DOL complaint as a precursor to negotiation without advising DOL of this "settlement."

In turning to Complainant's testimony, she testified, regarding the DOE complaint, that it was her understanding that her DOL complaint was being transferred to another forum. (TR 64) Ms. Gass' attorney at the time, Mr. Hyder, recommended moving the case from Wage and Hour, which was "doing nothing," to DOE and he was positive that the company would settle. (TR 89, 90) Complainant further explained that she agreed to transfer the case because although Investigator Reesor had interviewed her, nothing appeared to be happening and she was under considerable duress at work. Specifically, on several occasions, she could have been fired or the respondent could have made it look like she was at fault in some way. Further, she had a supervisor, Krista Turner, who was targeting her. Next, she was transferred to nuclear engineering, which was an unfamiliar area. This was also an extremely error prone job and she felt she was under extreme duress. (TR 83-86) Therefore, when Complainant saw something on a bulletin board regarding protecting workers in DOE which, she noted, was also her attorney's recommendation because he was positive the company would settle, she moved the case from DOL to DOE. (TR 89, 90) Complainant further testified that she did not remember whether she told her attorney what she read on the bulletin board about DOE jurisdiction or whether he brought it to her attention. (TR 95, 96)

On or about June 11, 1996, DOE made a preliminary decision to accept jurisdiction of Ms. Gass' reprisal complaint (Joint Exhibit 2). Thereafter, on June 18, 1996, Lockheed Martin, through its attorney, informed Mr. Yurow, Complaint Analyst, DOE, that Lockheed Martin was willing to participate in an attempt to arrive at a mutually agreed upon resolution of the complaint and also informed Mr. Yurow that Ms. Gass' complaint before DOE was her third filing, she had other complaints before the Equal Opportunity Employment Commission and the United States Department of Labor (her August 18, 1995 complaint) and that Part 708.6 required that Ms. Gass affirm under oath that she had not pursued a remedy under state or other applicable laws on the same set of facts on another occasion.

The above considered, I find insufficient evidence that Lockheed Martin misled Ms. Gass to do anything. Ms. Gass testified fully under oath as to her reasons why she and her attorney decided to transfer the case to DOE and not once did she mention Lockheed Martin inducing her, through threats or promises, to do so. With respect to Mr. Stivers' letter of June 18, 1996 to Mr. Yurow (Joint Exhibit 3) I find this letter both proper and reasonable under the circumstances. Mr. Stivers' letter of June 18, 1996 certainly cannot be evidence of inducement to transfer to DOE since the letter was written after Ms. Gass filed her complaint with DOE. Mr. Stivers' letter asks Mr. Yurow to review Ms. Gass' right to file a complaint with DOE considering Part 708.6; it did not necessarily cause Ms. Gass or her attorney, Stephen Hyder, to dismiss the DOL complaint, although it may have been the stimulus for Ms. Gass and/or her attorney to elect their remedy. Accordingly, as complainant was not actively misled by respondent, equitable estoppel is not applicable to her case.

B. Equitable Tolling

The doctrine of equitable tolling allows a complainant to avoid the bar of the statute of limitations if, despite all due diligence, he is unable to obtain vital information bearing on the issue of his claim. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). It does not assume wrongful effort by the respondent to prevent the complainant from suing; the complainant, however, is assumed to know that he has been injured, but he cannot obtain information necessary *to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant*. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (1990) (emphasis added).

The primary illustration given in *Cada* and subsequently cited in other cases, is one in which an employee is fired and does not realize that he has a potential age discrimination suit until he discovers his much younger replacement. After this discovery, he files suit, but by this time the statute of limitations period has passed. *Cada*, 920 F.2d at 451. The equitable tolling doctrine is, therefore, essentially a doctrine of "excusable ignorance."

Unfortunately for complainant, this second tolling doctrine also does not apply. First, according to her testimony, there was no doubt in her mind that she was subjected to adverse action or "wrongdoing", both before and after she filed her complaint. Second, complainant was also aware that the wrongdoing she alleges in her complaint was attributable to the respondent. Thus, unlike a person who has allowed the statute of limitations to expire, not knowing she has a claim for relief, complainant filed her original complaint within the statutory time period and filed this second complaint with the knowledge of the respondent's alleged wrongdoing. These facts do not invoke the protections of equitable tolling. Therefore, if I am to have jurisdiction to hear this case, there must be another equitable ground for hearing it.

C. Delay in Investigation

Title 29 C.F.R. § 24.4, entitled, "Investigations," in effect at the time Ms. Gass filed her August 18, 1995 complaint with the U.S. Department of Labor, states in pertinent part:

> (d)(1) Within 30 days of the receipt of a complaint, the Administrator shall complete the investigation, determine whether the alleged violation has occurred, and give notice of the determination which shall contain a statement of reasons for the findings and conclusions therein. Notice of the determination which shall be given by certified mail to the complainant, the respondent, and to their representatives. At the same time the Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, the original complaint and a copy of the notice of determination.

I accept as true Ms. Gass' testimony that at the time she filed her complaint and during the ten and one-half months that her complaint was pending before DOL, Wage and Hour Divsion, she was under extreme duress at work and other than being interviewed by an investigator, there was no information regarding the investigation or whether there was an investigation. The investigation, if any, was still incomplete by the time she filed a new complaint with DOE. Ms. Gass' testimony under oath on this issue was persuasive, compelling, and uncontradicted. Therefore, the question that must be asked is whether Ms. Gass was prevented, in an extraordinary way, from asserting her rights as a whistleblower under the various statutes set out in her August 18, 1995 complaint before the U.S. Department of Labor, due to the combination of the job duress and the failure of Wage and Hour to complete an investigation within the time mandated by 29 C.F.R. § 24.4(d)(1); or, stated a different way, was the withdrawal of her complaint before DOL on or about July 2, 1996 voluntary, or necessitated by the combination of duress and the failure of DOL to act in accordance with the Code of Federal Regulations. Here lies complainant's final argument for equitable grounds why I should accept jurisdiction.

In her "Supplemental Citations and Motion to Schedule Hearing" dated January 3, 2003, and in her Brief at line 30, complainant states that, "The DOL Employment Standards Administration (ESA) Wage-Hour Division (WHD) breached its legal duty to investigate and make findings within 30 days on [complainant's] timely 1995 whistleblower complaint." In support of this position, complainant cites the language of 29 C.F.R. § 24.4, *supra*. While the language of the regulation provides that within 30 days the administrator "*shall* complete the investigation", (emphasis added) the U.S. Supreme Court and subsequent courts addressing this issue have construed these regulatory provisions as merely directory, rather than mandatory or jurisdictional in nature.

In so doing, they hold that mandatory language alone, minus language specifying the consequences of failure of action, does not "divest the administrator of the authority to investigate after that time." *Brock v. Pierce County*, 476 U.S. 253, 266 (1986). *See also The Law Company*,

Inc., ARB No. 98-107 at 12 (September 30, 1999); *Timmons v. Mattingly Testing Svcs*., Case No. 95-ERA-40, ARB Dec. and Ord. of Rem., (June 21, 1996) (discussing regulatory time limitations imposed on the Department of Labor for investigating and adjudicating whistleblower complaints under the Energy Reorganization Act); *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Sec. Dec., (September 17, 1993).

As further clarification, the Administrative Review Board reasoned: "Absent any statement of contrary intent, such a limitation provides a projected timetable for agency action on a given complaint, rather than curtailing the agency's authority to resolve complaints." *The Law Company* at 12. Here, there is nothing in the language of the regulation at issue indicating what, if any, consequences would result by the Wage and Hour division's failure to complete an investigation during the thirty day time frame. Therefore, it must be construed as lacking an intent to bar agency action beyond the prescribed time frame and is therefore not jurisdictional or mandatory in nature. As difficult as this may be for the complainant, especially in light of her testimony regarding her attempts to expedite her complaint while it was before the Department of Labor, her argument that the Wage and Hour division breached its legal duty to investigate within thirty days is not supported by case law.

Thus, even considering the duress Complainant experienced at work during the ten months the Department of Labor investigation was pending, there is no legal basis to toll the statute of limitations back four years. I recognize that this result is harsh and ultimately denies Complainant the ability to present her full case in court; however, the situation remains that the tolling doctrines do not apply to her case, the delay in investigation, although unfortunate, was not a fatal act on the agency's part, complainant chose to litigate her case at the Department of Energy on the advice of her attorney and backed up by her own research, and the case remained at that agency for almost four years.

D. Waiver

Complainant's theory on waiver, as stated by her attorney, seems to be as follows and this argument appears at TR 42 and 43:

> The complaint never went away, I mean, it was there in the Federal Record Center, it had to be brought back from Atlanta. There was never any signed writing, by Ms. Gass, saying I withdraw my complaint. In order for her to withdraw a complaint, she has to be advised of her rights. Nobody ever advised her of her rights. Nobody from DOL, nobody from DOE, Ms. Merchant never called up; Ms. Merchant never obtained any signed writing, from Ms. Gass, saying I am dropping my complaint. There was discussion between attorneys, and Ms. Gass essentially was affirmatively misled, by the Respondent into thinking that if she proceeded with the DOE, she would get a quick settlement; and that her problems would go away.

Ms. Gass was represented by an attorney who advised Ms. Merchant on July 1, 1996 that she was withdrawing her complaint. (JX 4) The Secretary of Labor has held that where a complainant is represented by counsel, he has "access to a means of acquiring knowledge of his rights and responsibilities"... *Kent v.Barton Protective Services*, 84-WPC-2 (Sec,y Sept. 28, 1990) Moreover, the Secretary also stated, "Counsel are presumptively aware of whatever legal recourse may be available to their client, and this constructive knowledge of the law's requirements is imputed to plaintiff." (citations omitted). Furthermore, there is no evidence of wrongful inducement by Mr. Stivers or Lockheed Martin.

Accordingly, having considered all of the evidence, having read the parties' briefs and being otherwise fully informed, I recommend that Complainant's Complaint, filed on or about May 9, 2000, be dismissed for lack of jurisdiction. Respondent's Motion for Summary Judgment is GRANTED.

A

MICHAEL P. LESNIAK
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.